FILED
MAY 28 1970
JOHN E. DAVIS, CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1969

Nos. 1507, 1556

CLYDE A. PERKINS,
Petitioner,

vs.

STANDARD OIL COMPANY OF CALIFORNIA,
Respondent.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

FRANCIS R. KIRKHAM,
NOBLE K. GREGORY,
WALTER R. ALLAN,
225 Bush Street,
San Francisco, California 94104,
Attorneys for Respondent.

Of Counsel:
PILLSBURY, MADISON & SUTRO,
225 Bush Street,
San Francisco, California 94104,
McCOLLOCH, DEZENDORF, SPEARS & LUBERSKY,
800 Pacific Building,
Portland, Oregon 97204.

PARKER-HALEN PRINTING CO., SAN FRANCISCO, CALIFORNIA

Table of Contents

	Page
Preliminary statement	1
Statute involved	2
Question presented	2
Statement of case	3
Argument	4
Conclusion	7

Table of Authorities

Cases

	Pages
American Can Co. v. Ladoga Canning Co., 44 F.2d 763, certiorari denied, 282 U.S. 899	5, 6
American Crystal Sugar Co. v. Mandeville Island Farms, 195 F.2d 622	5
Briggs v. Pennsylvania R. Co., 334 U.S. 304	6
Kansas City So. Ry. v. Trust Co., 281 U.S. 1	6
Montague & Co. v. Lowry, 193 U.S. 38	5
Osborn v. Sinclair Refining Company, 286 F.2d 832	5, 6
Osborn v. Sinclair Refining Company, 207 F.Supp. 856	5, 6
Rangen v. Sterling Nelson & Sons, 351 F.2d 851	4
Sprague v. Ticonic Bank, 307 U.S. 161	7
Trans World Airlines, Inc. v. Hughes, 32 F.R.D. 604	6
Trans World Airlines, Inc. v. Hughes, 308 F.Supp. 679	6
Trans World Airlines, Inc. v. Hughes, 332 F.2d 602	6
Trans World Airlines, Inc. v. Hughes, 1970 Trade Cases, ¶ 73,142	6
Twentieth Century Fox Film Corporation v. Goldwyn, 328 F.2d 190, certiorari denied, 379 U.S. 880	4-5
United States v. Carter, 272 F.2d 363	5

Statutes

Clayton Act, section 4 (38 Stat. 731; 15 U.S.C. § 15)	2

In the Supreme Court
OF THE
United States

October Term, 1969

Nos. 1507, 1556

Clyde A. Perkins,
Petitioner,
vs.
Standard Oil Company of California,
Respondent.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

PRELIMINARY STATEMENT

This case does not present any important or novel questions. The Court of Appeals, in conformity with its past practice and the practice in other circuits, granted petitioner's application for attorneys' fees as costs on appeal before it. The Court also determined, in accord with long established authority, that the lower courts could not add additional costs to those already specified in this Court's mandate in prior proceedings.

STATUTE INVOLVED

The pertinent portion of section 4 of the Clayton Act (38 Stat. 731; 15 U.S.C. § 15) provides that a successful litigant may, in addition to damages, recover "the cost of suit, including a reasonable attorney's fee."[1]

QUESTION PRESENTED

The question stated by petitioner (Pet. in No. 1507, p. 2; Pet. in No. 1556, p. 2[2]) is not accurate. The Court of Appeals did not rule that the lower courts lacked authority to make an award of attorneys' fees as costs on appeal. To the contrary, the Court of Appeals expressly held that it had such authority and it made an award to petitioner for services rendered before it (Appx. A to Pet. in No. 1507, p. 2a; Appx. C to Pet. in No. 1556, p. 6a).

With respect to the application for an additional award of attorneys' fees as costs in this Court, petitioner has ignored the fact that the Court's mandate expressly

---

[1] In full text, section 4 of the Clayton Act provides:

"That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee" (38 Stat. 731).

[2] Petitioner has filed two petitions for certiorari—one from the Court of Appeals' decision awarding attorneys' fees as costs in that Court and denying the application for attorneys' fees as additional costs in this Court (No. 1507 in this Court) and one from the dismissal of the appeal from the district court's decision which denied petitioner's applications in that court for fees as costs in both the Court of Appeals and this Court (No. 1556 in this Court). Since the questions and points raised in both petitions are the same, this brief is filed in opposition to both petitions.

specified the costs to be awarded to petitioner for proceedings in this Court (Appx. D to Pet. in No. 1507, p. 13a; Appx. D to Pet. in No. 1556, p. 7a). Both the district court and the Court of Appeals found that they had no authority to alter or amend the award of costs made by this Court (Appx. A, C to Pet. in No. 1507, pp. 1a-2a, 12a; Appx. B, C to Pet. in No. 1556, pp. 4a, 5a-6a). Hence, the question is: when this Court's mandate expressly specifies the costs to be awarded on appeal, do the lower courts have authority to add to those awarded costs?

STATEMENT OF CASE

After satisfaction of a judgment of $1,298,213.71, including attorneys' fees in the amount of $289,000, petitioner applied to both the district court and the Court of Appeals for additional attorneys' fees as costs in appellate proceedings both in the Court of Appeals and in this Court. The district court denied petitioner's application and the Court of Appeals granted petitioner an award of attorneys' fees for services rendered before it (Appx. A, C to Pet. in No. 1507; Appx. B, C to Pet. in No. 1556). The Court of Appeals subsequently dismissed petitioner's appeal from the district court's decision (Appx. A to Pet. in No. 1556). Petitioner questions these decisions only insofar as they deny him an award of attorneys' fees as costs in this Court.

Both the district court and the Court of Appeals pointed out (Appx. A, C to Pet. in No. 1507, pp. 1a, 11a; Appx. B, C to Pet. in No. 1556, pp. 3a, 5a) that this Court's mandate was not silent as to costs, but, on the

contrary, expressly specified the costs to be awarded to petitioner, namely:

> "It is further ordered that the said petitioner, Clyde A. Perkins, recover from the Standard Oil Company of California Ten Thousand Nine Hundred and Sixty Dollars and Fifty-nine Cents ($10,960.59) for his costs herein expended.
>
> "'June 16, 1969
>
> "'Clerk's costs $ 150.00
> "'Printing of record 10,810.59
>
> Total $ 10,960.59'"

(Appx. D to Pet. in No. 1507, p. 13a; Appx. D to Pet. in No. 1556, p. 7a).

Both courts held that they could not properly alter the award of costs made by this Court (Appx. A, C to Pet. in No. 1507, pp. 1a-2a, 12a; Appx. B, C to Pet. in No. 1556, pp. 4a, 5a-6a).

ARGUMENT

Contrary to petitioner's assertions (Pet. in No. 1507, pp. 2, 6; Pet. in No. 1556, pp. 2, 4-6), the Court of Appeals did not hold that lower courts lack authority to award attorneys' fees for services rendered in appellate proceedings. In fact, the Ninth Circuit has followed the salutary practice that attorneys' fees are to be awarded by the court best in the position to determine the value of the services rendered, i.e., the panel which heard the proceedings (e.g., *Raugen, Inc. v. Sterling Nelson & Sons* (9 Cir. 1965) 351 F.2d 851, 863; *Twentieth Century Fox Film Corporation v. Goldwyn* (9 Cir. 1964), 328 F.2d 190,

222, certiorari denied (1964) 379 U.S. 880; *American Crystal Sugar Co. v. Mandeville Island Farms* (9 Cir. 1952) 195 F.2d 622, 626). Thus, in granting petitioner's application for fees for services rendered before it, the Court of Appeals noted that its action was "consistent with our general practice to act upon such applications instead of referring them to the trial court for determination" (Appx. A. to Pet. in No. 1507, p. 2a; Appx. C to Pet. in No. 1556, p. 6a).[3]

There is therefore plainly no conflict with the cases cited by petitioner (Pet. in No. 1507, pp. 5, 6, 8; Pet. in No. 1556, pp. 5, 6, 7) which hold either that the district court has discretion under the statute to award attorneys' fees as costs in proceedings before it (*Montague & Co. v. Lowry* (1904) 193 U.S. 38, 48) or that, under appropriate circumstances, the statute allows an award of attorneys' fees as costs in appellate proceedings (*American Can Co. v. Ladoga Canning Co.* (7 Cir. 1930) 44 F.2d 763, 772,

[3]The Court of Appeals also noted that "[w]here, however, we have directed further proceedings, we have on occasion referred this matter to the district courts", citing *United States v. Carter*, (9 Cir., 1959) 272 F.2d 363 (Appx. A to Pet. in No. 1507, p. 2a, ftn. 1; Appx. C to Pet. in No. 1556, p. 6a, ftn. 1). This, too, is consistent with the practice in other circuits (see, e.g., *Osborn v. Sinclair Refining Company* (D.Md. 1962) 207 F.Supp. 856, 864, where a district court awarded damages and attorneys' fees after reversal, pursuant to directions from the Court of Appeals to determine "what items * * * are recoverable" (4 Cir. 1960) 286 F.2d 832, 840).

certiorari denied (1931) 282 U.S. 899).[4]

The Court of Appeals did not pass on the question whether a lower court may award attorneys' fees for work done in this Court if the mandate does not include a direction as to costs. Instead, the Court pointed out that the mandate here in question expressly specified the costs to be awarded which were "enumerated both as to item and amount" (Appx. A to Pet. in No. 1507, p. 1a; Appx. C to Pet. in No. 1556, p. 5a). It has been long settled that when the costs to be awarded are specified:

> "* * * the purpose to authorize such costs [attorneys' fees] and to make such allowance should be clearly expressed in the decree.
>
> * * * * * *
>
> "The mandate required the execution of the decree. The District Court could not vary it or give any further relief" (*Kansas City So. Ry. v. Trust Co.* (1930) 281 U.S. 1, 10, 11).

---

[4]Petitioner also erroneously relies (Pet. in No. 1507, p. 6; Pet. in No. 1556, p. 6) upon two district court decisions, neither of which conflicts with the decisions below. In the first of these decisions, the district court awarded damages and attorneys' fees (*Osborn v. Sinclair Refining Company* (D.Md. 1962) 207 F.Supp. 856, 864) after reversal, pursuant to directions from the Court of Appeals to determine "what items * * * are recoverable" ((4 Cir. 1960) 286 F.2d 832, 840). In the second decision upon which petitioner relies, the district court had certified certain interlocutory orders for an interlocutory appeal while retaining jurisdiction to render a judgment for damages (*Trans World Airlines, Inc. v. Hughes* (S.D.N.Y. 1963) 32 F.R.D. 604, 608). After the determination of the interlocutory appeal (*Trans World Airlines, Inc. v. Hughes* (2 Cir. 1964) 332 F.2d 602), the district court entered its judgment for damages (*Trans World Airlines, Inc. v. Hughes* (S.D.N.Y. 1969) 308 F.Supp. 679) and thereafter awarded costs, including attorneys' fees (*Trans World Airlines, Inc. v. Hughes* (S.D.N.Y. 1970) 1970 Trade Cases, ¶ 73,142).

This is but an application of the general rule that "an inferior court has no power or authority to deviate from the mandate issued by an appellate court" (*Briggs v. Pennsylvania R. Co.* (1948) 334 U.S. 304, 306). As petitioner admits (Pet. in No. 1507, p. 7), in every case upon which he relies, the question of costs was left open by the mandate.[5] The Court of Appeals' refusal to alter the award of costs made by this Court was therefore correct.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petitions for writs of certiorari should be denied.

Dated in San Francisco, California, May 26, 1970.

FRANCIS R. KIRKHAM,
NOBLE K. GREGORY,
WALTER R. ALLAN,
Attorneys for Respondent.

Of Counsel:
PILLSBURY, MADISON & SUTRO,
McCOLLOCH, DEZENDORF, SPEARS & LUBERSKY.

---

[5] Similarly, if attorneys' fees are not recoverable as costs pursuant to statute but rather are subject to separate equitable proceedings, a mandate specifying costs does not cover attorneys' fees (*Sprague v. Ticonic Bank* (1939) 307 U.S. 161, 164, 168).